

Affirmative Action: Equal Employment Rights for Women in Academia

by Jinny M. Goldstein — 1973

Research work of professional social scientists and women's rights groups has revealed the existence of sex discrimination in American higher education. (Source: ERIC)

Throughout most of recorded history, institutions of higher learning have been citadels of progressive thought, of freedom of the mind and the spirit. They have been perceived as embodying man's noblest virtues, finding truth and imparting it to succeeding generations. In this country, colleges and universities have, since colonial days, held a very special place. For the most part they have provided the foci of liberal thought, and they have viewed themselves as leading other institutions toward enlightened social policies.

It is, therefore, with a mixture of shock and dismay that academia has found itself at the center of a heated controversy over the role of women in higher education, faced with the allegation that it is the colleges themselves that have perpetuated a system which subjugates and discriminates against those women who seek or are in academic careers. That shock and dismay have increased exponentially as the federal government has risen to the defense of these angry and frustrated women and has demanded that the colleges take positive action—to the satisfaction of government bureaucrats—to remedy these alleged wrongs.

Of course, the universities are not alone when it comes to questionable conduct towards women. While this article deals only with sex discrimination in higher education, it must be recognized that this is only a small segment, although perhaps symptomatic, of the characteristics of employment discrimination that pervade all sectors of our society.

The recent revitalization of the women's rights movement focused on the status of women in higher education, and this in turn has spawned numerous studies on that subject. Some of this research is the work of professional social scientists, but much has also been done by the women's rights groups which have sprung up on many college campuses.¹ Without exception, these studies reveal the existence of sex discrimination in American higher education.

Traditionally, teaching has been a primary career choice for professional women, in large measure predicated on their exclusion from most segments of the commercial and governmental worlds. Yet recent surveys indicate that only 22 percent of the professional (faculty and administrative) staffs of institutions of higher education are women.² Furthermore, while the absolute number of college teachers has risen by a factor of ten since 1920,³ the proportion of women has decreased over the years.⁴ Thus while the proportion of women entering the nation's work force has steadily increased since World War I, both their absolute and their relative representation on college faculties and administrations have significantly failed to keep pace with the rapidly increasing number of men employed by academic institutions.

The most damaging elements of this discrimination are not, however, revealed by simple employment figures. The proportion of women is greatest in the lower status institutions,⁵ and when they are hired women are appointed at lower levels than their male counterparts.⁶ Women remain clustered at the lower non-tenured ranks,⁷ often receiving less pay than equally qualified male faculty members,⁸ and rising in academic rank at a much slower rate than their male colleagues.⁹

On the administrative side, women have also been found to be strikingly underrepresented in positions of a policy-making nature. For example, while nearly 40 percent of the head librarians in private colleges are women, college presidents (in coed or all-male institutions) are 92 percent male. Even at the women's colleges, men hold a majority of the presidencies, and the chance of a woman becoming a college vice president is remote indeed.¹⁰

This article seeks to analyze the genesis of the evolving relationship between the colleges and the federal government in the field of sex discrimination, to identify its patterns, and to project its implications—if any—upon both the rights of women and the future of higher education as we now know it.

Before going into the substance of this study, it will be useful to look at the attitudes and problems faced by Washington in its intervention into the employment practices of colleges and universities. The federal government has always been wary of being accused of infringing upon academic freedom. Further, the contract compliance program has raised serious questions regarding reverse discrimination, the denial of due process rights, and the weakening of the concept of objective merit appointments. On the other hand, federal officials have been concerned lest their inaction serve to perpetuate what appeared to be a clearly unjust situation, a situation that was resulting in a vast waste of human (read female) potential.

In preparing this article, I relied upon both the existing scholarly literature and current material to be found in newspapers, magazines, internal reports, and congressional documents. The regulations and guidelines prepared for the implementation of the Executive Orders governing the federal contract compliance program were reviewed and analyzed, especially insofar as they revealed subtle changes in policy over the program's seven-year history. I interviewed federal officials in the Office for Civil Rights in HEW; leaders of women's rights organizations; representatives of higher education associations; college and university officials; and others active in the field of civil rights, especially as it concerns the area of equal employment opportunity. For case studies on federal involvement at particular campuses, personal contact was supplemented by material from the national and campus media, internal reports, and articles in the scholarly and popular journals. It is important to note that, due to the sensitive nature of the subject matter, particularly during the period when this material was being gathered, many college and university administrators, as well as government officials, were wary of revealing any information, and some peremptorily embargoed discussion of their cases. It is for this reason that the sources of certain information contained in this article cannot be identified.

Judicial and Legislative Protection Until very recently the legal protections guarding women against discrimination in employment were severely limited. The fundamental law of the land was silent with respect to sex, except insofar as the Nineteenth Amendment extended the franchise to women. Beyond that, women's rights had to depend upon the general implications of the equal protection and due process clauses of the Fifth and Fourteenth Amendments.

This picture changed radically when, on March 22, 1972, after a forty-nine year struggle by women's rights advocates, Congress approved an amendment to the Constitution providing that

Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

However, before this broadly phrased amendment can take effect, it must be ratified by three quarters of the states, and even the most optimistic proponents of the measure estimate that it may take up to two years to obtain the necessary ratifications, and then, under the terms of the amendment itself, another two years before it will become effective.

Out of the considerable debate that has surrounded this Equal Rights Amendment, one thing is clear at this juncture: a great deal of litigation will be necessary to ascertain its effect on the innumerable variety of situations which may fall within its scope. The amendment should clearly void discriminatory admissions and employment practices in state-supported educational institutions; on the other hand, private colleges and universities will not automatically fall within its purview, unless women's rights advocates can establish, to the satisfaction of the courts, that as a result of their state-issued charters, their subjugation to state regulation, and their receipt of substantial amounts of public funds, their activities fall into the category of "state action."¹²

With the expectation that the Equal Rights Amendment may not become law for several years, and since in any event no one can predict how it will be interpreted in practice, it is appropriate to continue to examine the state of the law under existing constitutional mandates. Traditionally, the courts, both state and federal, have been reluctant to determine cases of alleged sex discrimination on the basis of a denial of equal protection.¹³ However, since the turn of the century, and certainly with increasing frequency in the last decade, some state and lower federal courts have been willing to strike down laws and practices which differentiated on the basis of sex on the grounds that they represented an unreasonable classification and therefore denied the complainant equal protection.¹⁴ On the other hand, there have also been quite a few decisions, including some by the Supreme Court, that have upheld certain forms of sex-based differentiation as not being unreasonable or impermissible.¹⁵ The precedential value of any of these cases, pro and con, is diminished, however, by the scrupulous care most courts have taken to state clearly that they were deciding on the basis of the specific set of facts before them, and not setting a broad rule on the propriety of *any* classifications based on sex.¹⁶

The cases which have dealt with the question of sex-based discrimination on the basis of a denial of constitutionally guaranteed rights have had three things in common:

1. They concerned an overt policy which significantly differentiated between men and women on the basis of sex.
2. They failed to demonstrate a "reasonable basis" for such differentiation.
3. They were the result of "state action," bringing them within the scope of the Fourteenth Amendment (or the Fifth Amendment in the case of federal activities).

Thus the courts have been able to deal with such diverse areas as the right of women to hold specific types of jobs,¹⁷ engage in certain professions,¹⁸ attend the college of their choice,¹⁹ be imprisoned for an equal term,²⁰ and quaff a beer in the neighborhood tavern.²¹ But it is important to recognize that in each of these cases there was no question of the existence of a differential policy between men and women; women were in fact being treated differently solely because they were women.

When we attempt to apply these standards to the question of sex-based discrimination in the employment practices of institutions of higher education, we find that the presence of the critical elements is by no means clear. There are questions of fact concerning whether there indeed exists an affirmative policy which discriminates against women on the basis of their sex, and if such a policy does exist, is it without reasonable basis? Further, there is the considerable controversy over the status of acts by private colleges

and universities in terms of their constituting "state action" within the context of the Fourteenth Amendment. These questions, and especially the determination of the reasonableness of the employment practices of institutions of higher education, would project the courts into the arena of evaluating academic decision-making, and indeed overseeing the standards established with regard to the competence and capabilities of academic personnel. The thought of becoming embroiled in such an inordinately complex area of facts and policies, coupled with the spectre of being accused of attempting to abridge sacred academic freedom, has been enough to dissuade most courts from dealing with this issue.²²

On the legislative side, the Equal Pay Act of 1963 provided, for the first time, a specific federal statutory ban against sex-based discrimination, proscribing wage differentials based on sex.²³ However, as an amendment to the Fair Labor Standards Act of 1938, the Equal Pay Act inherited the FLSA's provisions excluding from coverage those persons engaged in executive, professional, and administrative positions. While this loophole was plugged in July 1972 as part of that year's Higher Education Amendments, making the Equal Pay Act applicable to college faculty and administrators, the change offered academic women protection only in cases of wage discrepancies, merely one aspect of employment discrimination.²⁴

In 1964 Congress enacted the landmark Civil Rights Act, Title VII of which prohibited discrimination in employment on the basis of race, religion, sex, color, or national origin.²⁵ Some analysts of the legislation have speculated, however, that "sex" was included not to extend the protection afforded through the proposed law, but to make it so unpalatable as to insure its defeat.²⁶ Originally Title VII could not affect the hiring of academic personnel, since it specifically excluded employees of educational institutions engaged in educational activities.²⁷ Furthermore, states and their subdivisions were likewise excluded from coverage,²⁸ thus preventing the application of the provision to public colleges and universities.

As with the Equal Pay Act, there were several attempts to amend Title VII to eliminate these exclusions, but it was not until February 1972 that such an amendment finally became law.²⁹ The Equal Employment Opportunity Commission (EEOC) now does have the power to act upon complaints of discrimination against academic personnel in institutions of higher education, both public and private, and, importantly, to enforce its rulings in federal court. The potential impact of this change may indeed be substantial, since in the past the EEOC has narrowly construed the permissible grounds for differentiations based on sex; but the new powers and procedures available to the EEOC have yet to meet the test of actual instances of discrimination, and it is possible that the courts may find themselves swamped with suits charging bias. On the other hand, the mere threat of legal action may be sufficient to encourage many offenders to remedy the inequities which do exist.³⁰

Most recently, Congress has enacted and the President signed into law a broad prohibition against sex-based discrimination in federally assisted programs at graduate, professional, and vocational schools and at public undergraduate institutions.³¹ The implications of this provision are not, however, clear, and it is apparent that the courts will have to resolve any ambiguity.

Thus while there are now several legislative weapons available in the fight against sex bias in employment at institutions of higher education, the congressional mandate in this area is not at all clear. In any event, the implementation of the new legislation will probably be in large measure dependent upon practices developed in connection with the administration of existing presidential directives (Executive Orders) aimed at combating sex-based discrimination.

The Executive Order Program A major breakthrough in the struggle for women's rights occurred when the Women's Equity Action League (WEAL) seized upon a little-known amendment to a presidential Executive Order dealing with discrimination by persons doing business with the federal government. Executive Order 11,246 had been issued by President Lyndon B. Johnson in September 1965, the sixth of a series of equal employment opportunity orders setting forth non-discrimination requirements for those who performed work under contract to the government.³² The Order placed two basic obligations upon all federal contractors, a group which included 80 percent of the nation's colleges and universities.

1. The contractor was prohibited from discriminating in his employment practices on the basis of race, creed, color, or national origin.
2. The contractor was required to go beyond a demonstration of mere *nondiscrimination* and take *affirmative* action to insure equal employment opportunity.³³

On October 17, 1967 President Johnson extended the coverage of Executive Order 11,246 to include discrimination based upon sex.³⁴ The President could promulgate such a sweeping prohibition against virtually all forms of discrimination because of the government's common law right to determine with whom it will do business and under what terms and conditions it will spend public monies in the conduct of that business.³⁵ These presidential Executive Orders have the full force and effect of federal law, differing from congressionally enacted statutes only insofar as they can be rescinded or amended at the discretion of the President.

Moving away from the voluntarism that characterized earlier efforts aimed at obtaining compliance with equal employment opportunity requirements, Executive Order 11,246 contained potentially potent sanctions and penalties to assure contractor action.³⁶ Both the Secretary of Labor and the contracting federal agencies were authorized to cancel contracts with firms found not

to be in compliance with the equal employment opportunity requirements, to condition the continuation of a contract upon the approval of a program to achieve future compliance, and to bar a firm from obtaining future contracts from *any* federal agency until it has proven that it has met its obligations.³⁷

But sanctions, no matter how stringent, can only be applied after the incidence of discrimination. To move contractors to act promptly to redress imbalances in their workforces, the Executive Order set up as its core the concept of *affirmative action* to achieve equal employment opportunity. The basic philosophy behind this approach is that passive nondiscrimination (colorblindness) may, due to the effects of past discrimination, provide for only incremental change in the employment patterns of certain groups, and may in fact serve to perpetuate their exclusion. The contractor, as the beneficiary of public largess in the form of federal contract funds, is therefore to be obligated to do more than simply agree to refrain from discrimination in the future. In this way, the government began to use its right to choose with whom it does business to implement an important social policy, coercing the private sector to apply its competitive skills, ingenuity, and acumen to develop personnel policies that could overcome implicit as well as explicit barriers to the achievement of equal employment opportunity, only a part of which may have been the result of the contractors' own conscious acts or omissions.

Executive Order 11,246 did not, however, define the term "affirmative action." Rather, the Order stated that it:

shall include, *but not be limited to*, employment upgrading, demotion, or transfer; recruitment or advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeships, (emphasis added)

The vagueness of the affirmative action obligation reflected the government's belief that it would not be possible to spell out precisely what should be done in every situation and under every set of circumstances, and that the regulations should be flexible to meet different needs. This intent was laudable, but the broadness of the mandate made it difficult -- -- if not impossible—for agency compliance officers to press for vigorous action from the contractors. Without a firm definition or formal standards for compliance and enforcement, conflicting interpretations inevitably developed, and these gave way to ill feelings, confusion, and ultimately, little in the way of worthwhile action. Those who were charged with the administration of the affirmative action provisions of Executive Order 11,246 were left in this predicament, and left there for over two years.

Aside from failing to define affirmative action, the Order did not indicate what would (or should) be considered an acceptable plan. It left unclear the process for determining compliance, or at what point sanctions might appropriately be imposed. Similarly, the requirements for supplying information and reports failed to specify the extent or type of information mandated, nor did they describe the circumstances under which a contractor could be exempted from all or some of the provisions of the Order. Such broad grants of discretionary authority needed to be elaborated upon before they could be rationally and consistently enforced.³⁸

The first set of regulations implementing the Order was issued two-and-one-half years after the initial date of the Order.³⁹ The effect of this delay could be seen in the fact that it was not until May 1968 that the first notices of debarment were issued to contractors found not to be in compliance; prior to the issuance of the implementing regulations, no such actions were taken.

The regulations stated that each contractor with fifty or more employees and with contracts with the government in excess of \$50,000 was required to develop, within 120 days after the commencement of the contract (or the effective date of the regulations, which ever occurred later) an affirmative action program for its entire organization. The contractor would be required to prepare an annual report of the results of its affirmative action program, and to revise its plans in accordance with that analysis. The regulations attempted to guide the development of affirmative action programs beyond mere procedural requirements: they called on the contractor to identify and analyze problem areas inherent in minority employment for his specific field, and to evaluate opportunities for the utilization of minority group personnel. The affirmative action program was required to provide *in detail* the specific steps the contractor intended to take to insure the achievement of equal employment opportunity "keyed to the problems and needs of minority groups (and women)." If deficiencies were found in the utilization of these groups, the affirmative action programs were then to also include goals, timetables, and tables of job classifications in order to provide essential personnel information.

The regulations told the contractor what to look at, but they still failed to provide standards for judging whether (or the extent to which) the contractor was deficient in terms of achieving equal employment opportunity. While the regulations stated that the contractor must, as part of an affirmative action program, detail the specific steps to be taken to implement equal employment opportunity, they did not reveal the bases upon which these steps would be judged in order to evaluate his compliance. The regulations did not attempt to define affirmative action: Did that term mean the achievement of a numerical quota, a significant change in workforce composition, or some other even more vague measure of performance?

In the event "deficiencies" were found in the contractor's program, the agency compliance officers were directed to put forth "reasonable efforts ... to secure compliance through conciliation and persuasion." Before the contractor could be considered in compliance, he would have to make a written commitment to correct the deficiencies "in a time period no longer than the minimum period necessary to effect such changes." Should these attempts to reach an accord fail, the compliance officer was then authorized to initiate sanction proceedings against the contractor.

Thus it was not only the contractor who was left without reasonable and sure standards upon which he could develop his plan of action. The agency compliance officers were likewise without firm guidance as to the parameters to be applied to the process of evaluating the efforts of those contractors under their jurisdiction. That this is a problem of grave importance has been noted by Kenneth Davis in his recent study of the administrative process:

The greatest and most frequent injustices occur at the discretion end of the scale where rule and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfection of human nature is often reflected in the choices made.⁴⁰

Even beyond the lack of standards, there were other problems inherent in the compliance regulations. There was no compulsion placed upon the contractor (or, for that matter, upon the compliance officer) to conclude negotiations swiftly. While time limits were set for the due process requirements of a hearing before the imposition of formal sanctions, the clearly preferred informal procedures of conciliation and negotiation could continue as long as the agency and the contractor deferred from taking any further action. In many cases this informal negotiating process provided a handy excuse for not making any decisions whatsoever.

The Sex Amendments When Executive Order 11,246 was amended in 1967 to encompass sex, all that was involved was a change in the listing of the proscribed classifications, from "race, creed, color, or national origin" to "race, color, religion, sex or national origin."⁴¹ The operative portions of this amendment became effective in October 1968, and within three months the Secretary of Labor promulgated a set of regulations which amended the original obligations of contractors by inserting the term "sex" into the appropriate places in the litany of classifications.⁴² They also modified the definition of minorities to include "*where appropriate*, female employees and prospective female employees" (emphasis added).⁴³ Under the normal rules of legal construction, this amendment should have accomplished two things: it should have added sex to the list of proscribed classifications described in the regulations pertaining to the obligations of contractors, and it should have expanded the general definition of the term "minorities" insofar as it was used in subsequently promulgated regulations (commonly known as Order* 4) relating to affirmative action programs.

The impact of this definitions clause on Order #4 was important, because the latter regulation, issued in February 1970, attempted not only to put the compliance effort into a more restrictive time frame, but to also to give real substance to the concept of affirmative action. Order#4 defined an affirmative action program as "a set of specific and result-oriented procedures to which the contractor commits himself to every good faith effort," placing increased emphasis on the use of goals and timetables as management tools for measuring the achievement of equal employment opportunity.

Logically, the change in the definitions clause should have affected Order #4, since that order was inserted in the Code of Federal Regulations immediately after the Obligations of Contractors and relied on the definitions clause of the earlier regulations to define its own terminology. However, the draftsmen of the amendment incorporating sex into the regulations were careful to impose a limitation on the inclusion of women within the banner of minorities. By adding the phrase "where appropriate," they left to the discretion of the enforcement officials the choice of whether, under specific circumstances or for specific portions of the affirmative action requirements, women should or should not receive the same protection as minorities.

The women's rights groups, on the other hand, saw Order #4 as a potent weapon in their fight against sex bias in employment, and they pressed the Labor Department to eliminate this ambiguity.⁴⁴ In June 1970, the Labor Department issued a new set of regulations dealing specifically with sex-based discrimination.⁴⁵ These "Sex Discrimination Guidelines" examined in some detail the affirmative action responsibilities of contractors with regard to 'sex, paralleling certain requirements set forth in the previously promulgated Order #4. The inference that the new Sex Guidelines rendered Order #4 inapplicable to sex was changed to a certainty when Labor Secretary Hodgson stated a month later that the "specific procedural requirements of Order #4 are not totally suitable to sex discrimination."⁴⁶ While noting that the concept of goals and timetables was equally appropriate as a tool to deal with both race-and sex-based discrimination, he indicated that the stringent requirements of Order #4 were "not sufficient to meet the often more difficult and elusive problems of sex discrimination." Thus, while the Sex Discrimination Guidelines set forth in some detail the kinds of employment practices a contractor would no longer be permitted to rely upon due to their inherent ability to discriminate against women, he was exempted from the obligation of developing a specific affirmative action plan along the lines set forth in Order #4 in order to improve the male/female ratio in his organization regardless of the existence or lack of overt discriminatory practices. Hodgson's explanation of this dichotomy was based on the premise that different criteria were necessary to determine whether there exist deficiencies in the employment of women than those used to deal with racial discrimination and deficiencies in employment. He announced that the Labor Department would begin a series of consultations with interested parties to arrive at its approach towards employing affirmative action to achieve equal employment opportunity for women through the application of the concept of goals and timetables.

Hodgson appeared to be buying time; perhaps he believed that the immediate imposition of the more stringent Order #4 requirements would overwhelm the entire equal employment opportunity effort, and might even result in the diminution of efforts to combat racial discrimination. At least up to that time, Labor Department officials were wary of activities that would dilute their concentration on race-related discrimination in employment with the potentially more complex issue of women's rights.

After many months of debate and consultation, on December 4, 1971 the Secretary of Labor finally revised Order #4 to make all of its provisions applicable to women as well as minorities.⁴⁷ Most of the changes from the previous version of the regulation simply involved adding the words "women" or "females" after the term "minorities" wherever the latter appeared in the text. The trivial character of these changes belies the "special" problems inherent in equal employment opportunity for women so strongly argued by administration officials.

Both the original Order #4 and the revised version covering women defined an affirmative action program as "a set of specific and result-oriented procedures to which the contractor commits himself in every good faith effort." This definition is important, for it made clear the mandate that goals were to be both explicit and accomplishable by the contractor, provided only that he made the necessary effort to do so. The new regulations emphasized that goals "should be specific for planned results" with timetables for completion; rather than inflexible quotas they should instead represent "reasonably attainable targets." The goals-and-time-tables requirement provided the contractor with the means for evaluating the progress of individual units within his organization, and gave the compliance officer a substantive way to evaluate contractor performance, including the pinpointing of potential problem areas. To avoid "goals" being interpreted as "quotas," the Order stated that a contractor's compliance status would not be based solely on whether he had met his goals, but also "if he has followed his program and is attempting to make it work towards the attainment of his goals."

The new Order #4 distinguished between the treatment to be afforded women as opposed to that required of minorities in only a few instances. Recognizing the possibility of different employment patterns between women and minority groups, a parallel section was added discussing those areas within which women were particularly likely to be underutilized. Another change concerned the definition of a base population for determining whether an imbalance exists in a contractor's workforce. In the case of minorities, the contractor was to consider the minority population in the surrounding community, while for women the base figure would be the proportion of women seeking work in the employment area. While the apparent rationale for this distinction lies in the uniform distribution of women (about 50 percent) in all communities, there is superimposed on this the belief that there is an immutable difference between the employment patterns of men and women.

In an area that has already generated much concern and litigation, the new regulations formally adopted the position that sex (or race, etc.) as a bona fide occupational qualification (BFOQ) be subject to close and narrow construction in accordance with the precedent established under Title VII of the 1964 Civil Rights Act.⁴⁸ The revised Order #4 also adopted the Civil Rights Act position (already assumed in the Sex Discrimination Guidelines) that local or state laws which conflict with the terms of the Executive Order and its implementing regulations are void and unenforceable.

The Sex Discrimination Guidelines, previously regarded as standing quite apart from the old Order #4, were integrated into the new regulations to the extent that contractors would be required to include their requirements within their affirmative action plans. The revised Order #4 directed contractors to develop recruitment programs that could attract minorities and women not presently in the workforce, and suggested a number of ways of accomplishing this task, including housing, day care, and transportation programs.

The contractors' complaint that they were being excoriated on the basis of merely statistical imbalances in their workforce composition was answered in part by a change in the Order #4 definition of imbalance, with a significant imbalance now being required to prove noncompliance. The government thus softened the definition of an impermissible imbalance (in racial or sexual composition) to require that there not only be a showing that there are fewer of the protected class than would be statistically anticipated (considering the base population and remembering the different bases used for minorities and women) but that this difference be large enough to point to its being caused by discriminatory practices. Again, in an attempt to clarify the regulations, the government has increased the possibility of selective enforcement of an ambiguous provision.

The WEAL Complaint In January 1970 the Women's Equity Action League (WEAL) formally requested that the Secretary of Labor direct HEW to "institute a class action and compliance review" of all colleges holding government contracts to insure that the heretofore moribund provisions of the amended Executive Order 11,246 relating to sex-based discrimination would be enforced.⁴⁹ Despite the fact that nearly three years had elapsed since 11,246 was amended to cover sex, neither HEW nor the colleges were prepared for such a demand. As late as July 1970, institutions of higher education still had not been officially informed of their responsibility to eliminate sex bias in their employment practices, and it was only a month earlier that HEW compliance officers had been directed to include data on the utilization of women in their evaluations of institutional affirmative action plans.⁵⁰

Coincidentally, the House Education and Labor Committee was holding hearings at that time on proposed legislation to prohibit sex-based discrimination in all federally-assisted programs and at educational institutions. In a prepared statement, Representative Martha Griffiths (D-Mich) expressed surprise and outrage at this apparent lack of federal enforcement effort:

Neither the Department of Labor, which is responsible for enforcing these executive orders, nor the Department of Health, Education, and Welfare, which is the compliance agency for the universities, has made any effort whatsoever to invoke these executive orders to prevent sex discrimination in employment or training by institutions of higher education. Under the Labor Department's own guidelines, federal contractors with fifty or more employees and a contract of \$50,000 or more must develop a written plan of affirmative action to prevent discrimination based on race, color, religion, sex, or national origin. I know of no such

college or university that has done so.⁵¹

In testimony before the committee, HEW officials confirmed that no directives had ever been sent to the colleges informing them of the provisions of the amended 11,246, nor had they been advised by HEW of the penalties for failure to comply.⁵² After pointing out that it had been almost three years since the Executive Order had been amended to encompass sex, Representative Edith Green (D-Ore) asked whether it was normal HEW policy to send notices of its programs to the affected parties. The Administration representatives conceded that the matter "had not been handled as directly as it could have" nor was it "given the importance it should have been given."

It was therefore something of a surprise when college officials learned in the summer of 1970 that they were to be held accountable to the federal government for yet another aspect of their internal affairs: their treatment of academic women. The confrontations between HEW and the colleges had the effect of putting form and definition onto the skeletal framework of 11,246 and its regulations. Analysis of the development and outcome of some of the early key cases can shed light on the evolution of the federal equal employment opportunity program as it has been applied to higher education, and perhaps offer some insight into the future ability of that effort to deal with the thorny problem of sex-based discrimination in academic employment.

The first complaint of sex-based discrimination to be acted upon under the provisions of 11,246 was filed in March, 1970 by the Harvard chapter of the women's rights organization NOW. Just a month before the complaint was lodged, HEW had begun a general compliance review at Harvard, dealing primarily with the question of racial discrimination. As a result of the NOW complaint, the scope of the HEW review was expanded to encompass sex-based discrimination.⁵³

A primary task of the compliance officer is to obtain sufficient personnel data to develop a picture of the institution's employment practices. This seemingly innocuous requirement was to become the basis for a major confrontation between Harvard and Washington when, on April 7, 1970, HEW compliance officers were denied access to the individual personnel files of Harvard employees. University officials indicated that they would provide "impersonal" data, but they refused to release the individual files on the grounds that they contained confidential material. HEW countered that the only way to ascertain whether or not the female employment pattern was the result of institutional discrimination was to examine the individual files, and they further argued that the government had a legal right to *all* information necessary to the conduct of the compliance review, and that the university, as a contractor covered by the provisions of the Executive Order, was obliged to supply that information.

Harvard officials replied that they had a long-standing policy of refusing access to university personnel files to other federal agencies, and would stand behind that position. They claimed that allowing federal investigators to pour through the individual records would abridge academic freedom and violate the faculty's rights of privacy. According to the regional director of HEW's Office for Civil Rights, negotiations on the release of the personnel files went all the way to the White House. For more than a month, the university stuck with its refusal, only to capitulate to the federal demands when faced with the prospect of an immediate termination of an estimated \$60-million in government grants and contracts. The final agreement between Harvard and HEW allowed the compliance team to examine individual files, "provided certain precautions were taken to guard the privacy of individuals whose files were being examined."

(A similar dispute arose at the University of California at Berkeley, with HEW officials demanding access to letters of recommendation in personnel files. College authorities argued that once it became known that such letters would be open to scrutiny by outside agencies, they would lose their value as aids to the recruitment process. HEW, on the other hand, contended that letters of recommendation often provided useful clues in detecting instances of sex bias, as where a present department chairman indicates that the applicant has shown interest in raising a family and thus might not make a good long-term prospect. However, unlike the Harvard case, the government agreed not to press the matter, and allowed the university to remove letters of recommendation prior to the examination of the files by HEW officials. But HEW's acceptance of this position should not be considered a complete victory for the colleges, for it can likewise serve to deprive them of the use of a valuable tool for disproving the existence of sex bias. A college could not expect to present one letter of recommendation to rebut a charge of discrimination, and then deny federal access to others in its files.)

In late September 1970, Harvard officials received part of the compliance review findings, primarily in the area of minority employment. The university was instructed to develop an affirmative action plan addressing itself to those findings, while the compliance review continued, this time focusing on several allegations of sex-based discrimination.

Harvard submitted its first affirmative action plan on November 2, 1970 and one month later received a twenty-two page letter from HEW declaring the plan unacceptable. The rejection was based on the absence of analyses of the areas in which the institution was deficient, and the failure of the university to vest proper authority in the presidential assistant charged with developing and carrying out the provisions of the plan. Beyond this summary rejection of the initial affirmative action plan, the letter from Office for Civil Rights regional director John Bynoe contained an extensive discussion of the more recent findings of the HEW compliance officers, this time primarily in the area of sex bias. The thrust of the compliance report was that a wealth of evidence was uncovered to substantiate several allegations of unequal treatment of women by the university. The findings indicated that many of the recruitment, placement, promotion, and staffing practices appeared to discriminate "purely because of sex," resulting in a definite under-utilization of women at the university. The compliance report noted that although Harvard annually granted from 15

to 19 percent of its doctoral degrees to women, there was an almost total lack of tenured female faculty, with many department chairmen still proclaiming that they could not find qualified women for academic positions. Chairmen and others responsible for hiring and promotion of faculty were cited as often "indifferent" to the concept of equal employment opportunity for women, and the report described a consistent pattern of men being paid more than women for the same work, with women being concentrated in the lowest paying, lowest opportunity, lowest prestige positions. The HEW letter concluded that "in order for the university to continue its eligibility to receive government contracts," it would have to "eliminate the discriminatory treatment of women, erase the effects of past discriminatory treatment, and amend the affirmative action program to insure equal employment opportunity for women applicants and equal treatment for women employees."

The university was required to rework its entire affirmative action plan, especially with regard to its efforts in the area of sex discrimination, and to submit the revised plan to HEW by February 1971. Harvard claimed that it presented the amended plan to the federal authorities substantially on schedule, and on February 11 the new plan was accepted by the agency. However, both HEW and the university refused to release its provisions, despite an active campaign led by the *Harvard Crimson*. An effort to force the release of the plan under the provisions of the federal Freedom of Information Act failed when the Labor Department exempted it from disclosure by declaring the plan a part of an on-going investigation.⁵⁴

The *Crimson* charged that Harvard's plan had been accepted on faith by the regional HEW office even before the compliance staff could review it, and despite the official silence elements of the plan began to leak out, primarily through installments published in the *Crimson* during the fall of 1971. The new plan set forth in only general terms Harvard's commitment to the securing of equal employment opportunity for female faculty and staff, stating that "a number of actions and policies have been undertaken to seek out and employ women in academic ranks" and to "increase participation by women on committees which involve recruitment and selection of academicians." But it was just such general statements that were criticized by HEW in its rejection of the first plan, and in calling for the new plan the government had specified that it wanted a result-oriented commitment from the university. While the revised plan further stated that Harvard recognized the underrepresentation of women in academic positions, and that therefore "the university commits itself to hiring additional women for such positions," the plan noted that the specific steps to be taken to achieve those ends were to come from subsequent recommendations of committees to be established to deal with the utilization of women in the various schools and departments of the university. There was almost no discussion as to how the virtually autonomous units of the university would actually achieve such an increase, and statistical information and timetables were not among those documents secured for public examination.

Harvard officials were apparently either reluctant or unable to deal with most of the issues raised in the December letter from HEW. The revised plan spoke in broad terms about equal employment opportunity for women but refrained from providing a detailed scheme for achieving that goal, nor did it relate in specific terms to the recruitment, promotion, and other policies cited in the HEW report. Finally, the second plan lent credibility to the assertion of compliance officers that dealing with Harvard was actually more like working with twenty-two independent institutions. The plan did not presume to set university-wide standards, but rather referred to activities to be undertaken by each of the separate components -- colleges, schools, divisions, and institutes -- of the total university.⁵⁵

The Harvard case is important for two reasons: first, the university challenged the basic right of the government to delve into its internal personnel files, arguing that this would constitute a major breach of academic freedom and personal privacy. The fact that HEW did not back down, even before all the pressures so prestigious an institution as Harvard could muster, is indicative of the potential force of the federal mandate, and the difficulties faced by the colleges in marshaling sufficient resources and support to counteract it. This precedent may best be described as a decision to treat a great and honored institution of higher learning in the same manner as any other federal contractor.

Second, this case demonstrated the enormous difficulty inherent in the development of a useful affirmative action plan for an institution of the nature and complexity of the modern American university. From September 1970 right up to the present Harvard has been attempting to satisfy the pressures of Washington, the women's groups, and its own faculty, and it is still engaged in numerous efforts aimed at arriving at detailed affirmative action plans for its various units. Indeed, such an extended timetable appears to be the norm for institutional affirmative action programs; Columbia University is among many other schools to have seen their struggle with HEW continue from year to year. Perhaps most significant, the difficulty and delay encountered in the development of an acceptable affirmative action plan highlights the considerable problems faced by the colleges in dealing with sex bias when there is lacking a firm consensus not only as to the specific responses required, but also as to the very nature of the problem.

Affirmative Action In this discussion of the policy and administration of the federal affirmative action program aimed at sex bias in academic employment, we have left until this point a discussion of three fundamental issues:

1. Whether the affirmative action program is the proper vehicle to combat employment sex bias in academic institutions.
2. If it is an appropriate device, do its negative implications still outweigh the potential benefits.
3. Whether the deep federal involvement required through this process creates a dangerous precedent for more pervasive and perhaps pernicious intervention into, and indeed control of, American higher education.

The controversy over the affirmative action program revolves in large measure around the concept of specified employment goals for certain groups of employees or potential employees. To many people the term "goals" sounds suspiciously like "quotas," a device traditionally used to exclude from employment people from various ethnic, racial, or sex groups. With the requirement of "goals and timetables" written into the affirmative action program, many of the old fears of quotas have again risen to the surface.

It should be clear, however, that the use of goals in the equal employment opportunity program is significantly different from the traditional concept of quotas. Of course, the easiest argument can be based on the fact that these goals are being used for benevolent purposes to eliminate employment discrimination, rather than to foster or shield it. But it is perhaps more useful to look upon the use of goals—and their attendant timetables—as a management information device to allow both the regulated industry (the colleges) and the regulatory agency (HEW) to monitor more effectively and evaluate the progress being made towards the achievement of actual equal employment opportunity. Rather than being forced to deal in vague generalities and concepts, the use of specified goals enables all parties to concentrate on those factors that clearly affect the composition of the contractor's workforce.

Importantly, the employer's compliance status is not evaluated solely on the basis of whether or not he achieves his preordained goals. On the contrary, the regulations explicitly state that:

No contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetable. Rather, each contractor's compliance posture will be reviewed and determined by reviewing the contents of his program, the extent of his adherence to his program, and *his good faith efforts to make his program work* towards the realization of the program's goals within the timetables set for completion, (emphasis added)⁵⁶

Indeed, the contractor is forbidden from discriminating against any qualified candidate on the basis of race, color, sex, or religion by relying on such goals, and this applies as much to reverse discrimination as it would to the traditional forms of exclusion.

But despite these safeguards in the text of the law, many critics of the goals-and-timetables concept remain concerned that the threat of cancellation of huge and lucrative federal contracts will cause some college officials to treat their institution's goals as quotas to be met by any means possible, including the exclusion of qualified males (or other majority group members) in favor of women (or other minorities). They fear that, under such circumstances, preferential treatment will result in the hiring and promotion of people on the basis of their sex or race, rather than on their individual merits and qualifications.

An exchange on the "Op Ed" page of the *New York Times* crystallized this debate. Philosopher Sydney Hook asserted that the effect of the affirmative action program is to compel the institutions to hire unqualified members of the target classes and discriminate against qualified members of the present majority groups.⁵⁷ He charged the federal officials responsible for the program with "fostering the very racism and discrimination the Executive Order was issued to correct," and he struck at HEW's use of employment statistics to determine the existence of discrimination, claiming that there were important and valid reasons for the present employment patterns of blacks and women: namely, their lack of qualifications and their disinclination to pursue that field of endeavor.

In a reply entitled "Come Now, Professor Hook," HEW's civil rights chief, Stanley Pottinger, asserted that the spirit of merit appointment—that "one's qualifications regardless of race, or sex are the main criteria of employment"—was at the heart of the Executive Order program and exemplified the policy of his office.⁵⁸ He stated that Hook's argument was premised on the assumption that the universities were not in fact discriminating against women and blacks, that these groups were where they were because of their own different interests and capabilities, and that therefore HEW was asking the universities to abandon their established criteria of appointment solely on individual merit and qualification. On the contrary, Pottinger declared that HEW employment reviews pointed to clear patterns of discrimination and an avoidance of objectivity when women or blacks were involved. But he noted that the affirmative action program "does not mean that white males on campus must now consider their days numbered." "Instead," he concluded, "men will simply be asked by their universities to compete fairly on the basis of merit, not fraternity; on demonstrated capability, not assumed superiority."

Paul Seabury of the University of California at Berkeley raised a number of points that carry Hook's arguments a bit further.⁵⁹ He criticized the affirmative action program for creating what he believed may become an entrenched system of preferential treatment which, in his view, will undermine the entire system of higher education. He further charged that the current attention being directed towards equal employment opportunity for women was diverting attention away from what he clearly considered the more critical needs of minority (racial and ethnic) groups. The latter argument is one that cannot be lightly dismissed, but neither need it be accepted at face value. Initially officials charged with enforcing the federal contract compliance program refused to give serious attention to the plight of women, and indeed they openly stated that given their limited resources they had to direct their efforts towards the elimination of racial discrimination. It was only after women were finally able to mount an effective campaign to gain attention and put pressure on the government that sex-based discrimination became an item of serious official concern at all. It is certainly true that for a time the enforcement of equal employment opportunity for women may to some extent diminish the ability of the compliance agencies to deal with racial discrimination with the same vigor they ostensibly displayed before sex gained some priority. But it may be argued that this is due in large measure to the officials' own avoidance of the sex bias problem for many years, and now it seems only fair that they catch up with their accomplishments in the race area. Indeed, would Professor Seabury

really wish to see cases of discrimination left untouched because they involved women and not blacks? Perhaps he feels competent to evaluate the insidious effects of discrimination and has somehow concluded that the discrimination suffered by women is less destructive and damaging than that heaped upon blacks. Discrimination in any form, wherever or however it is practiced, regardless of victim, is destructive to the individual, to those around him (or her), to the institutions perpetuating it, and to the entire society.

As to Seabury's contention that the affirmative action program will create competition between blacks and women for the same positions, it can be argued that the proper prosecution of the equal employment opportunity program will for the first time allow these groups to compete with *all* others solely on the basis of individual merit, with at last the realistic chance to obtain access to the employment for which they are qualified. Indeed, the entire aim of the federal program is to overcome the long and deeply entrenched system of preferential treatment that has traditionally favored the white male in academia.

Seabury also argued that there are other groups statistically underrepresented in academic positions (such as Catholics), and that the position of women is not unique. Either by natural inclination or cultural choice, he concludes that at any given point in time certain groups are less likely to be represented in some occupational areas and overrepresented in others. He uses the case of Jews whom, he explained, entered higher education in numbers far beyond their proportionate share of the population once the "protective quotas" limiting their access were lifted. But this completely undermines Seabury's entire argument, for it points to the insidious effects of exclusionary quotas, and the inability to judge a group's potential in a given field until those restrictions are lifted. Prior to the elimination of the quota system that limited the involvement of Jews in many colleges and universities, would Seabury have concluded, as he apparently has for women and blacks, that their low numbers in the profession indicated that they themselves had chosen not to enter the field or that they lacked the necessary qualifications? Indeed, the effects of these restrictions on women are even more pernicious, for the inherent discrimination in the system of recruitment and promotion extends back to graduate school and college, and the potential female academician may well be dissuaded from entering upon that career very early in her education. It is only by removing all the barriers to equal employment opportunity, and thereby truly allowing individual ability and inclination to determine career choice, that we will really be able to determine just how many women can and will actually enter this or any other field.

Potential Abuse Although so far the basic premises of the affirmative action program have been defended, the weaknesses and possible harmful effects noted by the various critics must be recognized and dealt with. Abuse of the merit concept and the resultant danger to academic standards may indeed arise out of the failure of the institutions themselves to put a full effort into the recruitment of qualified personnel. Certainly the colleges will have to do more recruiting, and engage in new forms of recruiting, to identify qualified women for academic positions. But if the schools fail to revise their recruitment systems, or fail to provide the necessary direction and resources to achieve significant change, then it is almost certain that the results will not differ markedly from the current situation. The closed recruiting system so prevalent in higher education is quite successful in isolating many of the most qualified women from contention, and the institutions must be willing, through affirmative action, to break out of that system to achieve their goals without sacrificing the quality they so loudly proclaim. Indeed, it has been suggested that some institutions may be seeking to fulfill their own prophecies of doom by limiting their recruiting efforts to demonstrate the lack of qualified women, and even go so far as to hire those who may be *less* qualified to prove their predictions that the equal employment opportunity program would destroy academic excellence.

Another potential hazard might result from college administrators using the leverage built into the affirmative action program to secure greater control over the personnel practices of academic units, without really responding to the needs of women and minorities.

The intervention of the federal government in the internal affairs of academic institutions itself poses certain problems. Through the contract compliance program (affirmative action), colleges holding federal contracts are now subject to a degree of government scrutiny and control far beyond anything previously deemed possible. Not only are their personnel practices evaluated and their hitherto confidential records subject to review, but under the threat of loss of considerable resources they may be required to substantially revise their own professional recruitment and promotion policies, develop complicated and costly data collection systems, and, most startling to traditional academicians, be called upon to justify specific personnel decisions before outside—non-academic—auditors. This federal involvement into the most intimate operations of the universities has been challenged as an unnecessary and improper infringement upon the traditions of academic freedom and autonomy handed down from medieval times.

However, there do not seem to be any convincing reasons to exempt our institutions of higher education from the federal equal employment opportunity program and its affirmative action requirements. The colleges and universities benefit from large amounts of government support, for which they compete with all the intensity of private contractors, and they should be able to abide by the same reasonable requirements for the utilization of those public funds. Certainly requiring them to eliminate discrimination, against women as well as against racial and ethnic minorities, does not appear to be too great a price to pay for obtaining support from the public treasury. National policy and the fundamental law of the land support non-discrimination, and in the absence of specific legislation the affirmative action program seems to be an appropriate way to secure compliance.

Still, while this instance of governmental intervention appears virtuous, one must nonetheless remain wary of the abuse of the enormous power put in the hands of federal officials through this program. Agency compliance officers are afforded considerable

discretionary authority in the negotiation of affirmative action plans and the supervision of contractor compliance, with the design of the program giving these officials considerable latitude and flexibility to respond to the specific facts and circumstances surrounding particular cases. Surely the differences between institutions are great, and it would be both difficult and probably unwise to attempt to promulgate narrow regulations to cover all situations. But while there is value in preserving this degree of fluidity, such discretion by its very nature carries with it certain hazards. Professor Davis aptly states that "discretion is a tool only when properly used; like an axe it can be a weapon for mayhem and murder."⁶⁰ Davis argues this discretionary power must be structured, checked, and confined so that the actors have adequate rules to guide them. Further, he notes that their actions must be supervised and kept within proper bounds by duly constituted higher authority, which itself must be restrained by the limitations of law and good judgment.

In light of this discussion, is Executive Order 11,246 and its implementing regulations so vague as to make it impossible for reasonable persons to agree upon the boundaries of action required or permitted under their purview? Alternatively, are the allegations of abuse of discretion merely the result of bureaucrats acting beyond the scope of their authority in contravention of unambiguous rules?

To answer these questions one must look at both the regulations and the complaints that have arisen through their application. The four basic documents which guide the affirmative action program are the Executive Order itself (including the amendment to cover women), the Obligations of Contractors, the Sex Discrimination Guidelines, and the revised Order #4. Taken together these comprise a detailed group of rules covering virtually every aspect of the compliance program, except the informal negotiations which take place between federal compliance officers and university officials. It is in this latter area where the bulk of the complaints arise, with the most common charge centering around allegations that compliance officers attempt to exact concessions from the institutions far in excess of program requirements in return for obtaining a favorable compliance report. These charges have often focused on alleged demands that the institution establish hiring quotas for specific groups, despite the direct prohibition of such quotas in the regulations. It has been further argued that such demands have frequently borne no relationship to the available pool of qualified candidates, the number of applicants from that group, or any other reasonable standard beyond raw population statistics. It is this species of charges that has been used by critics to substantiate their allegations that the affirmative action program is having a negative effect on the academic merit system.

I would argue, on the contrary, that these alleged abuses do not represent the natural consequence of the federal equal employment opportunity program. Rather, they exemplify the problems inherent in the abuse of individual discretion. Discretionary power is, of course, largely dependent upon the character of those who wield it, and it is certainly not difficult to imagine how some compliance officers, in their zeal to achieve the goals of the program, may overstep their real authority and place excessive or even extra-legal demands upon the institutions. What is required is not the elimination of a fundamentally sound and constructive program, but rather the securing of adequate safeguards to insure that the rights of all parties are adequately protected, including the women and minorities who are supposed to be the beneficiaries of this effort.

In some respects the regulations may be tightened to reduce the unbridled discretion of the compliance officers without depriving them of necessary flexibility to deal with varying situations and institutional types. Perhaps more important would be closer supervision by regional HEW officials of the compliance review and negotiating process, and in turn closer supervision by Washington, especially in those cases where important precedents may be established. Certainly it is essential that policy decisions be made on a national basis, so that schools need not fear being whipsawed between local officials and their Washington counterparts.

An improvement of considerable significance would involve the establishment of an expeditious review process in cases where institutions feel that the compliance officer (or HEW regional official) has exceeded his proper authority or made an error in judgment. This would allow for a more reasoned review, as opposed to the present system which permits a formal hearing only *after* an institution has been found not to be in compliance and just before the termination of federal contracts. It may even be possible to move in the direction of Professor Davis' administrative tribunals, which would decide such cases outside the framework of the federal agencies, much as the courts adjudicate cases brought by the prosecuting attorneys.

Finally, the compliance officers must be subjected to rigorous training to insure that they do not lose sight of the limitations imposed on their powers, and the constitutionally guaranteed due process rights of the parties with whom they must deal. Equally important, as has been shown in a number of actual cases, the compliance officers must be trained to comprehend the different nature of the academic bureaucracy, and especially the very different powers and responsibilities of the college president as compared to his commercial counterpart.

It is similarly important that the institutions receive guidance as to what they should (and should not) expect during a compliance review, both so that they will be prepared to respond to proper requests and so that they will know when to contest a decision to higher authority.

In the final analysis, the government must enter with care into the academic marketplace. We are not dealing here with the production of steel or automobiles, but with the development of ideas and the transference of knowledge. It may be but a small step from the monitoring of academic personnel practices to insure that they are administered in an even-handed and nondiscriminatory manner, to the application of pressure to secure the appointment of "appropriate" faculty and administrators.

That may take the form of quotas—perhaps not so benignly applied—but it could develop into virtual control over who does or does not teach, get appointed, or be promoted. The threat of withholding federal funds, presently an increasingly vital part of almost every institution's financial existence, is an enormously potent weapon. It may be enough of a weapon to secure the agreement of institutions to teach or study that which Washington deems important (as indeed occurred in the post-Sputnik era) and perhaps ultimately enough to convince them *not* to teach what is out of favor. Unrestrained, the hand of government can become oppressive indeed, and academic freedom is a delicate thing that can be -- and has been -- readily stifled. One need only go back to the 1950s to recall instances when faculty were fired and programs curtailed to protect institutional support.

To prevent the achievement of such a manifestly undesirable end, the institutions must acknowledge their obligation to insure the equality of opportunity that justice demands, and yet remain firm against over-enthusiastic federal intervention into the sensitive matters of academic content and form. At the same time, the government must strike a balance between the enforcement of a policy designed to protect all the people, and implementations of that policy that may either unfairly punish the colleges for faults that are beyond their capacity to correct or which turn them into its pliant instruments.

Like public assistance to the poor, federal support of higher education has evolved into that grey area between a mere privilege and a protected right. Both the government and the schools must tread carefully to prevent funds from being used as a bludgeon to coerce the universities to do Washington's bidding, or at the other extreme to be considered the vested interest of the institutions against which the government and the people it represents can make no claims.

Affirmative action under the federal contract compliance program has the potential for achieving enormous change in the area of equal employment opportunity in higher education, as indeed it does in the commercial world. But it is not without its problems and dangers, and its ultimate success must depend in large measure on the demonstrated good faith of the institutions, the government, and those for whose benefit the program was established.

1. For a compilation of over forty reports on sex-based discrimination in higher education, see Lora H. Johnson, ed. *The Status of Academic Women*, Review 5. Washington, D.C.: ERIC Clearinghouse on Higher Education, 1971.
2. Women's Bureau, U.S. Department of Labor. *Underutilization of Women Workers*, revised. Washington, D.C.: U.S. Government Printing Office, 1971, p. 11.
3. Committee on University Women. *Women in the University of Chicago*, unpublished report. Chicago: University of Chicago, 1970. See Table D.2, Faculty and Other Professional Staff in Institutions of Higher Education, 1900-1964 By Sex, p. 74.
4. Women's Bureau, U.S. Department of Labor, *op. cit.*
5. Report of the Committee on the Status of Women in the Faculty of Arts and Sciences. Cambridge, Mass.: Harvard University, 1972, p. 2. See also John B. Parrish, "Women in Top Level Teaching and Research," *Journal of the American Association of University Women*, January 1962, pp. 99-107.
6. Jo Freeman, "Women on the Social Science Faculties Since 1892," unpublished address, University of Chicago, 1969; Jean Henderson, "Women as College Teachers," unpublished doctoral dissertation, University of Michigan, 1967. See also *Discrimination Against Women at the University of Pittsburgh*, unpublished report, University of Pittsburgh, 1970.
7. Alan E. Bayer. *College and University Faculty: A Statistical Study*. Washington, D.C.: American Council on Education, Office of Research Reports, Vol. 5, No. 5, 1970; Jessie Bernard. *Academic Women*. University Park, Pa.: Pennsylvania State University, 1964; Rita Simon and Evelyn Rosenthal, "Profile of the Woman Ph.D. in Economics, History, and Sociology," *American Association of Women Journal*, No. 60, 1967, pp. 127-129.
8. Bayer, *Ibid.*; Alan E. Bayer and Helen S. Astin, "Sex Difference in Academic Rank and Salary Among Science Doctorates in Teaching," *Journal of Human Resources*, Vol. 3, 1968, pp. 191-200. See also Rosenthal and Simon, *Ibid.*
9. Alice S. Rossi, "Discrimination and Demography Restrict Opportunities for Academic Women," *College and University Business*, No. 48, 1970, pp. 74-78; Carol Bynum and Janet Martin, "The Sad Status of Women Teaching at Harvard," *Radcliffe Quarterly*, No. 54, 1970, pp. 12-14.
10. Ruth Oilman, "Campus 1970-Where Do Women Stand?" *American Association of University Women Journal*, No. 64, 1970, pp. 14-15; Henderson, *op. cit.*; Susan Kaufman, "Few Women Get Positions of Power in Academe, Survey Discloses," *Chronicle of Higher Education*, Vol. 5, No. 10, November 30, 1970, pp. 1 and 4. _
11. H.J.R. 208, Ninety-second Congress, Second Session, 1972.
12. See *Simkins v. Moses H. Cohn Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963), *cert. den.*, 376 U.S. 938 (1964), holding that a private hospital receiving federal support is subject to the Fourteenth Amendment. See also William Mauk, "Student Due Process and State Action," unpublished Masters thesis, Teachers College, Columbia University, 1971.
13. Historically the first major test of the scope of the Fourteenth Amendment, the *Slaughter House Cases*, 83 U.S. (16 Wall) 36, 21 L.Ed. 394 (1873), provided a very narrow construction of that provision. In a long line of cases, the courts have avoided coming to grips with the Equal Protection aspects of classifications based on sex, through the expedient of declaring that basis reasonable for the purpose at hand. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Radice v. New York*, 264 U.S. 292 (1924), upholding sex-based state labor laws; *Goesaert v. Cleary*, 335 U.S. 464 (1948), restricting types of

- occupations; *Hoyt v. Florida*, 368 U.S. 57 (1961), upholding a state statute permitting women but not men to excuse themselves from jury service. On this latter point, compare, *Leighton v. Goodman*, 311 F. Supp. 1181 (S.D.N.Y., 1970); *De Kosenko v. Brandt*, 63 Misc. 2d 895, 313, N.Y.S. 2d 827 (Sup. Ct., 1970).
14. See, for example, *Sail'er Inn v. Kirby*, 485 P. 2d 529, 95 Cal. Rptr. 329 (Sup. Ct., 1971), overturning a state statute prohibiting female bartenders and declaring sex to be a "suspect classification" with "no relation to ability to perform or contribute to society." *Id.* at 540, 95 Cal. Rptr. at 340.
 15. In *Muller v. Oregon*, 208 U.S. 412 (1908), the Court upheld a statute limiting the maximum hours of employment of women in certain classes of occupations, even though it had previously struck down a similar statute applying to all employees, *Lochner v. New York*, 198 U.S. 45 (1905). *Mutter* did not overrule *Lochner* but simply held that the female may be "properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained."
 16. See, for example, *Kirstein v. Rector & Visitors*, 309 F. Supp. 184 (E.D.Va., 1970), where the court, although upholding the plaintiffs' right to overcome certain sex-based admission policies, declined to extend its ruling to bar any sex-based limitations on admissions to the state college system. See also *Reed v. Reed*, U.S. 92 S. Ct. 251, 30 L. Ed. 225 (1971), decided during the 1971 fall term of the Supreme Court, a landmark decision applying the equal protection clause of the U.S. Constitution to strike down an Idaho statute that gave preferential treatment to men in the determination of administrators for decedent estates. But the Court went to considerable lengths to indicate that it was ruling only on the merits of the specific statute, and was *not* deciding that sex would now join race as an impermissible classification. *Id.* at 253, 30 L. Ed. at 229.
 17. *Paterson Tavern & Grill Owners Association, Inc. v. Borough of Hawthorne*, 57 N.J. 180, 279 A.2d 628 (1970); *Brown v. Foley*, 158 Fla. 734, 20 So. 2d 870 (1947); but see, on the other hand, *Goesaert v. Cleary, op. cit.*
 18. *Shpritzer v. Long*, 32 Misc. 2d 693, 224 N.Y.S. 2d 105 (Sup. Ct., 1961) *modified*, 17 App. Div. 2d 285, 234 N.Y.S. 2d 285 (1962), *affd* 13 N.Y. 2d 744, 241 N.Y.S. 2d 869, 191 N.E. 2d 919 (1963).
 19. *Kirstein v. Rector & Visitors, op. cit.*; also see, *Williams v. McNair*, 316 F. Supp. 134 (D.S.C., 1970).
 20. *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn., 1968); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A. 2d 400 (1968); but see, *Work v. State*, 266 A. 2d 62 (Maine), *cert. den.*, 400 U.S. 952 (1970), which failed to overturn a state law providing for longer prison terms for escapees from the men's prison than from the women's reformatory.
 21. *Gallagher v. City of Bayonne*, 106 N.J. Super. 401, 256 A. 2d 61 (Super. Ct. App. Div.), *affd per curiam*, 55 N.J. 159, 259 A. 2d 912 (1969), striking a local ordinance prohibiting women from being served at the bar; *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F. Supp. 593 (S.D.N.Y., 1970) prohibiting private sex-based discrimination in a public tavern.
 22. For an examination of the attitudes of the judiciary on equality of the sexes, see Johnston and Knapp, "Sex Discrimination by Law: A Study in Judicial Perspective," 46 N.Y.U.L.R. 675, 1971.
 23. 77 Stat. 56, 29 U.S.C. §206 (d) (1963).
 24. P.L. 92-318, 84 Stat. 235, 86 Stat., 375, modifying 29 C.F.R. §541 (1970).
 25. 78 Stat. 253, 42 U.S.C. §2000e (1964).
 26. See remarks by Representatives Emmanuel Celler (D-NY) and Edith Green (D-Ore.), 110 *Cong. Rec.* 699, 1964, p. 2583; see also Paul Seabury, "HEW and the Universities," *Commentary*, Vol. 53, February 1972, p. 38.
 27. §702, 78 Stat. 255.
 28. §701 (b), 78 Stat. 253.
 29. P.L. 92-261, 86 Stat. 103.
 30. See Barbara J. Lewis, "Women and the Law," *Annual Survey of American Law*, 1970-71, pp. 343-364; Note "Sex Discrimination in Employment Under Title VII of the Civil Rights Act of 1964," *Vanderbilt Law Review*, Vol. 21, No. 4, May 1958, pp. 484-489.
 31. Higher Education Amendments of 1972, P. L. 92-318, Title IX, §901; but see Conference Report on S. 659, Sen. Doc. 92-798, May 22, 1972, p. 221.
 32. 32 30 Fed. Reg. 12,319 (1965), 42 U.S.C. §2000e, Supp. V (1970); the sequence of Executive Orders, their purposes, and promulgators are: No. 8,802 (1941), prohibiting discrimination by defense contractors and creating the Fair Employment Practices Committee, without giving it any enforcement powers (Roosevelt); No. 9,346 (1943), extending coverage to all government procurement contractors (Roosevelt); No. 10,308 (1951), establishing an eleven-member committee to study existing compliance efforts (Truman); No. 10,479 (1953), creating the President's Committee on Government Contracts, headed by Vice President Nixon, still with only investigatory and advisory powers (Eisenhower); No. 10,925 (1961), setting forth the first penalties for non-compliance and focusing responsibility on the newly formed President's Committee on Equal Employment Opportunity (Kennedy). Other Executive Orders dealing with the obligations of government contractors included No. 9,001 (1941), No. 10,210 (1951), No. 10,227 (1951), No. 10,231 (1951), No. 10,243 (1951), No. 10,281 (1951), No. 10,298 (1951), No. 10,557 (1954), No. 11,114 (1963). For a thorough discussion of the Executive Order program in the context of contract compliance, see U.S. Commission on Civil Rights. *Federal Civil Rights Enforcement-1971*, pp. 45-49. See also Peter G. Nash, "Affirmative Action Under Executive Order 11,246," 46 N.Y.U.L.R. 225 (1971).
 33. Executive Order 11,246, §202(1), 30 Fed. Reg. 12,319 (1965).
 34. Executive Order 11,375, 32 Fed. Reg. 14,303 (1967).
 35. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).
 36. *Farkas v. Texas Instrument Corp.*, 375 F. 2d 629 (5th Cir., 1967), *cert. den.*, 389 U.S. 977 (1967), and *Farmer v. Philadelphia Electric Co.*, 329 F. 2d (3rd Cir., 1964) upheld the legality of the Executive Order program to require

government contractors to provide equal employment opportunity.

37. The first four Executive Order programs were completely based on the power of the government to exert moral suasion, Executive Orders 8,802, 9,346, 10,308, 10,479. Kennedy's program called for sanctions, but these were never applied, Executive Order 10,925. _
38. See, generally, Kenneth Gulp Davis. *Discretionary Justice*. Baton Rouge, La.: Louisiana State University Press, 1969, for an excellent discussion of the need to provide guidance and limitations within which agency regulators must function. The lack of firm action on the development of implementing regulations affected and was affected by other problems that plagued the equal employment opportunity effort during the first two years following the issuance of Executive Order 11,246. There was a shortage of personnel to administer the program, a failure to collect adequate statistical information, and a lack of leadership by OFCC over the contracting agencies. The agencies were reluctant to strictly interpret the terms of the Order to their own suppliers and grantees, with the result that their individual guidelines and standards were often at odds with the original intent of the Order. Although problems such as these were not unique either to equal employment opportunity efforts or OFCC, the failure to take concerted action did leave OFCC and the contracting agencies open to criticism and significantly decreased their credibility as enforcement agencies. The most important effect, however, was the increasing feeling among interest groups that the much touted shift from voluntarism to enforcement was no more than official hyperbole.
39. Obligations of Contractors and Subcontractors, 33 Fed. Reg. 7,804,41 C.F.R. Part 60-1 (1968).
40. Davis, *op. cit.*, p. v.
41. Executive Order 11,375, 32 Fed. Reg. 14,303 (1967); the term "religion" was also substituted for "creed."
42. 34 Fed. Reg. 744 (1969), amending 33 F.R. 7,804,41. C.F.R. Part 60-1.
43. Amending 41 C.F.R. §60-1.3 (definitions) by adding a new subpart (z).
44. See, for example, letter from Ms. Ann Scott, National Organization for Women, to Assistant Labor Secretary Arthur Fletcher, June 17, 1970, reprinted in *Discrimination Against Women. Hearings on H.R. 16,098 Before the Special Subcommittee on Education of the Committee on Education and Labor, U.S. House of Representatives*, Ninety-first Congress, Second Session, 1970, p. 157. See also statement by Ms. Lucy Komisar, National Vice President for Public Relations, National Organization for Women, reprinted in *Discrimination Against Women*, p. 938.
45. 35 Fed. Reg. 7,115,41 C.F.R. Part-60-20(1970).
46. U.S. Department of Labor, Press Release No. 11-366, July 31, 1970.
47. 36 Fed. Reg. 23,152 (1971), 41 C.F.R. Part 60-2 (1971).
48. 42 U.S.C. §2000e-2(e) (1) (1964), setting forth Title VII definition of "Bona Fide Occupational Qualification." 41 C.F.R. §60-2.20 (a) (1) requires following of Civil Rights Act construction. See *Weeks v. Southern Bell*, 408 F. 2d 228 (5th Cir., 1964); *Bowe v. Colgate-Palmolive*, 416 F. 2d 711 (7th Cir., 1969), *rev'd in part*, 272 F. Supp. 332 (S.D. Ind., 1967); see also *Cheatwood v. South Central Bell*, 303 F. Supp. 754 (M.D. Ala., 1969); *Diaz v. Pan American World Airways, Inc.*, F. 2d (5th Cir., 1971), *rev'd*, 311 F. Supp. 559 (S.D. Fla., 1970); but see *Gudbrandson v. Genuine Pans Co.*, 297 F. Supp. 134 D. Minn., 1968.
49. The WEAL request was embodied in a letter dated January 31, 1970 to Secretary of Labor George Schultz. Since that time, over 350 colleges have been charged with sex discrimination under Executive Order 11,246. See *Project on the Status and Education of Women*, Report No. I. Washington, D.C. Association of American Colleges, 1971.
50. See testimony of Associate Commissioner for Higher Education Peter Muirhead. *Discrimination Against Women*, pp. 647-649.
51. *Ibid.*, p. 141.
52. *Ibid.*, pp. 647 and 649.
53. See Nancy Gruchow, "Discrimination: Women Charge Universities, Colleges with Bias," *Science*, Vol. 168, No. 3,931, May, 1970, p. 560.
54. The Harvard student newspaper, the *Crimson*, initiated the action to force the release of the material. See *Harvard Crimson*, October 5, 1971, p. 1. The Freedom of Information Act was signed into law on July 4, 1966, going into effect one year later. P.L. 89-487, 5 U.S.C. 552. It set forth specific exemptions to the rule of full public disclosure of agency records and required all federal agencies to promulgate formal regulations governing public access to those records. The HEW regulations governing its records (and those of its constituent agencies) were issued June 30, 1967, 32 Fed. Reg. 9,315,45 C.F.R. 5.1.
55. The apparent deficiencies in the February plan finally caught up with it, for in August HEW formally rejected the plan and required a new version from the university. Harvard submitted its third revised plan on November 29, 1971.
56. 41 C.F.R. §60-2.13.
57. *New York Times*, November 5, 1971, p. 43.
58. *New York Times*, December 18, 1971, p. 38.
59. Seabury, *op. cit.*, pp. 38-44.
60. Davis, *op. cit.*, p. 25.

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